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February 6, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 12th St. SW
Washington, D.C. 20554

**Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP
Telephony Services are Exempt from Access Charges, WC Docket 02-361**

Dear Ms. Dortch:

The attached letter was sent to Chairman Powell in connection with the proceeding identified above. Pursuant to the Commission's rules, please include a copy of this letter in the docket of that proceeding.

Sincerely,



Glenn T. Reynolds

cc: William Maher
Jeffery Carlisle
Tamara Preiss
Jennifer McKee
Michelle Carey
John Rogovin
Jeffery Dygert
John Stanley
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**Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP
Telephony Services are Exempt from Access Charges, WC Docket 02-361**

Dear Chairman Powell:

In the course of this proceeding, AT&T has pointed repeatedly to the Commission's 1998 *Universal Service Report to Congress*¹ as somehow—Administrative Procedures Act notwithstanding—creating an entirely new exemption from the Commission's access charge rules for telecommunications services that to any extent utilize Internet Protocol for transport within the carrier's own network. Confronted with the fact that this argument is legally specious,² AT&T and others have resorted to asserting that they reasonably relied on a single sentence in that *Report* to unilaterally stop paying access charges otherwise due. As such, this argument goes, even if the Commission rejects the legal theory upon which these carriers claimed to have relied, they should not be required, as a matter of fairness, to pay such charges from the past. However, because any such argument begins with the proposition that reliance was *reasonable*, this claim for retroactive relief fails for all the reasons put forth by parties in this proceeding—namely, that no one could *reasonably* believe that the Commission created a new

¹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd 11501 (1998) ("*Report to Congress*").

² AT&T concedes that the services it is providing are telecommunications services and not enhanced services. Thus, this entire debate rests squarely on whether the *Report to Congress* changes the Commission's Part 69 rules. Clearly, the answer is no. As BellSouth discussed in its letter dated January 9, 2004, the *Report to Congress* did not and could not have changed the access charge rules. The Administrative Procedures Act ("APA") cannot be discarded on an entity's, or the Commission's, whim. Understandably, neither Time Warner nor AT&T discuss the APA requirements, because the result is obvious—a report, which did not have an ordering clause, and which makes broad inconclusive statements about a subject that was not discussed in a public notice, cannot possibly change established and continuing rules. Any attempt by the Commission to suggest such a notion would not withstand judicial scrutiny.

exemption to one of its core rules through a single word in a non-rulemaking proceeding on a totally different issue.³

Even if such a reliance argument were not beyond the pale for some unsophisticated actor, it is beyond challenge that the entities affected by this issue are all experienced industry participants familiar with the rulemaking obligations of the Commission. The Commission has always been subject to the APA and the requirements for establishing and changing established rules. It simply is not reasonable for carriers—and their lawyers—regulated by the Commission to assume that one vague sentence from a report dramatically changed the access charge rules.

Still, AT&T goes further and asserts, without support, that, “[t]he entire industry has operated for years on the understanding that phone-to-phone VOIP services have been exempt from access charges” and that “SBC and other ILECs made no attempt to collect access charges for those services.”⁴ While BellSouth cannot speak for any other company, AT&T’s sweeping statement that the “entire industry” blindly supported AT&T’s position since 1998 is entirely untrue. The truth is that even AT&T didn’t start espousing this position until long after the *Report to Congress*—and there is not a shred of evidence in the record to support a finding that anyone shared AT&T’s “belief” until after this proceeding was initiated. Indeed, such statements in its *ex partes* to the Commission are directly contradictory to the argument made in AT&T’s own Petition initiating this proceeding—that is, Commission clarification on this question was critical because so many local carriers (and at least one state commission) disagreed with AT&T’s position and were treating such traffic as subject to access charges.

By contrast, BellSouth’s position on this question has been made patently clear since 1998 to all the carriers with which it interconnects. As BellSouth stated in its opposition to AT&T’s Petition, shortly after the Commission released the *Report to Congress* BellSouth issued a notification to all “Providers of Long Distance Calling via Internet Protocol” informing them that such service was subject to BellSouth’s access services tariffs (see attachment A to this letter). BellSouth’s stated position in that notice was identical to its position now—that phone-to-phone voice over Internet protocol services are, consistent with the *Report to Congress*, telecommunications services and as such are subject to access charges. BellSouth also posted a carrier notice letter on its interconnection web site providing the same notification to all carriers.

³ In recent *ex partes*, AT&T has also cited for the first time to language in the Regulatory Flexibility section of the Commission’s Notice of Proposed Rulemaking in the *Intercarrier Compensation* proceeding as a further basis for their reliance that the Commission created an exemption for this traffic. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001). Stating the obvious, it is difficult to fathom AT&T’s argument that it “reasonably relied” upon a Commission statement that it apparently didn’t discover until more than a year after it filed its Petition. In any event, AT&T’s argument as to the significance of that statement is belied by the language in the substantive portion of the *NPRM* directly counter to its position. *See id.* at 9613, 9616, ¶¶ 6 & 12.

⁴ Letter from David L. Lawson, Sidley Austin Brown & Wood LLP, on behalf of AT&T, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, at 2 (Dec. 22, 2003).

Additionally, language in the majority of BellSouth's interconnection agreements with CLECs specifically states that traffic of the type at issue in AT&T's Petition shall be subject to access charges. That language provides:

Additionally, any Public Switched Telephone Network interexchange telecommunications traffic, ***regardless of transport protocol method***, where the originating and terminating points, end-to-end points, are in different LATAs, or are in the same LATA and the Parties' Switched Access services are used for the origination and termination of the call, shall be considered Switched Access Traffic.

The fact that the *majority* of BellSouth's interconnection agreements specifically provide that the carrier's chosen transport protocol does not alter the analysis of whether access charges apply belies AT&T's sweeping claim that the "entire industry" presumed otherwise. Certainly, those carriers agreeing to this provision were not 'operating with the understanding' that such traffic was exempt from access charges.

It should be noted that the current state-specific interconnection agreements BellSouth signed with AT&T starting in July of 2001 do not have the language quoted above. Instead, because the parties were unable to come to an agreement on this question, they included specific language in their contracts agreeing to disagree, but agreeing to abide by applicable and effective FCC rules. The interconnection agreements between BellSouth and AT&T in effect prior to July 2001 did not specifically address transport protocol issues; but as evidenced above, BellSouth has consistently and publicly stated that access charges are owed for interexchange traffic, regardless of transport protocol used. BellSouth does not dispute that AT&T has asserted its position since the negotiations of its interconnection agreements in 2001; but it is totally disingenuous under the facts for AT&T to claim the "*entire industry has operated for years on the understanding that phone-to-phone VOIP services have been exempt from access charges.*"

Similarly, it is simply false for AT&T to assert that BellSouth has "made no attempt to collect access charges" for its IP-in-the-middle traffic. Consistent with its published position, BellSouth has been diligent in assessing and collecting access charges on such traffic to the extent it can detect it. Identifying how AT&T routes traffic within its own network is extremely difficult for anyone other than AT&T. However, BellSouth has gone to great lengths to detect AT&T's efforts to disguise this traffic by routing it through AT&T's own CLEC. Where BellSouth has discovered this activity, AT&T is in fact paying BellSouth access charges subject to dispute, as required by its agreement. Moreover, BellSouth has defended its position on the application of access charges to this traffic in proceedings before multiple state commissions in its region.

In sum, there is no evidence in the record that any carrier other than AT&T relied, let alone reasonably, on a sentence in the *Report to Congress* to stop the payment of access charges on phone-to-phone *telecommunications services* of the sort described in AT&T's Petition. Even assuming, *arguendo*, that any reasonable reliance would excuse the payment of access charges,

reasonable reliance would have to be based upon the actual deeds and behavior of an individual carrier—not on *false* sweeping generalizations about the industry as a whole.

Amazingly, and in obvious recognition that there is no legally supportable basis upon which the Commission could rule in its favor, AT&T is now asking the Commission *not to resolve* this issue which they claimed to be of such urgency 16 months ago. To do as AT&T now requests, would be effectively to condone AT&T's illegal conduct when enforcement action would be more appropriate. It would also signal the beginning to a chaotic collapse of the Commission's access and universal service regimes as every other carrier—ILEC, CLEC and IXC-- will feel obligated to follow suit in order to remain competitive. In fact, as a result of the Commission's delay, this is already happening. Instead, the Commission should act quickly and affirmatively and reject AT&T's argument as nothing more than a desperate effort to legitimize its self-help access avoidance effort.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn T. Reynolds", with a stylized, cursive script.

Glenn T. Reynolds

cc: Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Bryan Tramont
Christopher Libertelli
Jessica Rosenworcel
Dan Gonzalez
Lisa Zaina
Scott Bergmann